MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

July 13, 1984

Robert G. Berning
Executive Director
Capital Area United Way
300 N. Washington Square, Suite 201
Lansing, Michigan 48933-1285

Dear Mr. Berning:

This is in response to your letter to Secretary of State Richard H. Austin requesting an opinion regarding the lobby act, 1978 PA 472, (the "Act").

The first of your two questions is whether the Act has "any implications for the normal conduct of the annual campaign on behalf of the United Way among State employees?"

Without further information it is impossible for this Department to respond to the question. I have enclosed a copy of the Act and Rules and a general overview which outlines the Act's requirements. These publications should be of assistance in answering your questions about the Act.

Your second question is set forth as follows:

> "Second, would provisions of the Act apply should we become involved in potential future deliberations of the Administrative Board regarding the policy which allow payroll deduction and authorizes the United Way campaign among State employees?"

The Act differs from previous lobby statutes in that it covers lobbying of the executive branch of government. The enclosed overview covers the basics of these requirements.

The members of the State Administrative Board are public officials. Direct communications made for the purpose of influencing administrative action by the Board is lobbying.

"Administrative action" is defined in section 2(1) of the Act (MCL 4.412) as follows:

> "Sec. 2. (1) 'Administrative action' means the proposal, drafting, development, consideration, amendment, enactment, or defeat of a nonministerial action or rule by an executive agency or an official in the executive branch of state government. Administrative action does not include a quasi-judicial determination as authorized by law."

"Nonministerial action" is also defined in the Act in section 6(3), (MCL 4.416):

> (3) 'Nonministerial action' means an action other than an action which a person performs in a prescribed manner under prescribed circumstances in obedience to the mandate of legal authority, without the exercise of personal judgment regarding whether to take the action."

You should keep in mind that the obligation to register and report arises when a lobbyist has expended $1,000.00 or more or a lobbyist agent has been paid $250.00 or more, in the course of engaging in lobbying.

You should carefully review the enclosed materials. This Department will, of course, be available to help you with specific questions regarding the Act's applicability to your activities.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

Enc.

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

32-84-LI

July 13, 1984

Rossi Ray Taylor, Director
Legislative and Community Relations
Lansing School District
519 W. Kalamazoo Street
Lansing, Michigan 48933

Dear Mr. Taylor:

This is in response to your inquiry concerning applicability of the lobby act (the "Act"), 1978 PA 472, to the Lansing School District and its employees.

Specifically, you indicate that certain employees are officers or members of independent educational associations and professional organizations. As officers or members, they frequently lobby on behalf of the associations and organizations. Some of the lobbying occurs on "company time," that is while the employees are compensated by the School District. You ask whether the School District, itself a lobbyist, is required to "register these individuals as lobbyist agents or to report their activity." For purposes of discussion, it is assumed the employees do not receive compensation or reimbursement for lobbying from the associations or organizations.

Pursuant to section 8(1) of the Act (MCL 4.418), a lobbyist is required to report all of its "expenditures for lobbying," including compensation or reimbursement paid to its employees for that portion of time devoted to lobbying. According to sections 5(5) and 7(2) of the Act (MCL 4.415 and 4.417), an employee who is compensated or reimbursed more than $250 in any 12 month period "for lobbying" must register as a lobbyist agent. Consequently, the School District and its employees are subject to the Act's reporting requirements only if the compensation or reimbursement paid to the employees is "for lobbying."

"Lobbying" is defined in section 5(2) of the Act as "communicating directly with an official in the executive branch of state government or an official in the legislative branch of state goverment for the purpose of influencing legislative

or administrative action." According to section 5(3), "influencing" includes "promoting, supporting, affecting, modifying, opposing or delaying by any means."

In Pletz v Secretary of State, 125 Mich App 335 (1983), plaintiffs argued the definitions of "lobbying" and "influencing" were unconstitutionally vague and ambiguous. The Court of Appeals, in rejecting plaintiffs' contention, suggested the key factor in determining whether a communication is for lobbying is whether the communication is "for the purpose of influencing." The Court cited with approval a New Jersey case which defined the phrase "to influence legislation":

> "' . . . we conclude that the meaning to be ascribed to this terminology is activity which consists of direct, express, and intentional communications with legislators undertaken on a substantial basis by individuals acting jointly for the specific purpose of seeking to affect the introduction, passage, or defeat of, or to affect the content of legislative proposals.'" 125 Mich App at 130

Thus, "lobbying", as viewed by the Court of Appeals, consists of direct, express and intentional communications with public officials for the specific purpose of affecting legislative or administrative action.

An employer does not engage in direct, express and intentional communications which are specifically intended to influence a public official's actions simply by paying employees for time which the employees may spend lobbying on behalf of independent associations or organizations. Reportable lobbying occurs only if the employer directs or controls the employee's lobbying activity. Whether the employer exercises direction or control depends upon a variety of factors. For example, paying the employee's membership dues for an organization suggests the employer may have some control over the employee's communication for lobbying.

In answer to your question, the Lansing School District is not required to report compensation or reimbursement paid to an employee for time the latter spends for lobbying on behalf of an educational association or professional organization which is not affiliated with the School District. This is true provided the School District has no direction or control over the employee's lobbying effort. Similarly, an employee under these circumstances is not required to register as a lobbyist agent for the School District.

On the other hand, if the School District directs or controls its employee while lobbying for the association or organization, Lansing School District must report the compensation paid to the employee as an expenditure for lobbying. In addition, an employee who receives compensation or reimbursement in excess of $250 in a 12 month period from the School District in this situation must register as a lobbyist agent and file periodic disclosure reports as required by the Act.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

33-84-LI

July 20, 1984

Mr. Peter H. Ellsworth
Dickinson, Wright, Moon, VanDusen and Freeman
121 East Allegan Street
Lansing, Michigan 48933

Dear Mr. Ellsworth:

This is in response to your letter requesting a declaratory ruling with respect to the reporting of certain financial transactions pursuant to the lobby act, 1978 PA 472 (the "Act").

You want the Secretary of State to interpret section 8(1)(c) (MCL 4.418) which provides for the reporting of certain financial transactions involving public officials. Section 8(1)(c) provides for reporting the following information:

> "(c) An account of every financial transaction during the immediately preceding reporting period between the lobbyist or lobbyist agent, or a person acting on behalf of the lobbyist or lobbyist agent, and a public official or a member of the public official's immediate family, or a business with which the individual is associated in which goods and services having value of at least $500.00 are involved. The account shall include the date and nature of the transaction, the parties to the transaction, and the amount involved in the transaction. This subdivision shall not apply to a financial transaction in the ordinary course of the business of the lobbyist, if the primary business of the lobbyist is other than lobbying, and if consideration of equal or greater value is received by the lobbyist. This subdivision shall not apply to a transaction undertaken in the ordinary course of the lobbyist's business, in which fair market value is given or received for a benefit conferred." (emphasis added)

In your letter you urge the Department of State to adopt an interpretation which would apply the exception set forth in the underlined language to lobbyist agents as well as lobbyists. Based on research your firm has conducted you have concluded that the Legislature could not have intended to exclude lobbyist agent from this exception. Additionally, you argue that limiting the exception to lobbyists only renders this portion of the Act unconstitutional.

While the arguments you set forth are interesting, the Department cannot agree with them. The language appears to be very clear in excepting only those transactions of a lobbyist in the ordinary course of business if the lobbyist's primary business is other than lobbying.

Drafters of legislation reflect known factual situations in their legislative product. At the time the Act and its predecessor legislation were considered by the Legislature, large professional law and accounting firms were just beginning to engage in lobbying on a large scale at the state level in Michigan. Greater awareness of the growth of such involvement might very well have resulted in the inclusion of lobbyist agents in the exception to section 8(1)(c). The Legislature could, of course, modify the exception along the lines you have suggested.

As you know, the Act has been the subject of a vigorous challenge in the courts. The language of 8(1)(c) has withstood that challenge without further judicial elaboration. Since the language of the exception is clear there appears to be no room for expansion of the exception by the Department of State.

Based on the above, the Department of State declines to issue the declaratory ruling you seek.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

August 3, 1984

Gregory K. Merryman
Appellate Practice & Research
General Motors Building
3044 W. Grand Boulevard
Detroit, Michigan 48202

Dear Mr. Merryman:

This is in response to your request for a declaratory ruling concerning applicability of the lobby act (the "Act"), 1978 PA 472, to the following set of facts.

If it is determined that General Motors Corporation is not in compliance with the Air Pollution Act, 1965 PA 348, as amended, or a rule promulgated thereunder, the company may enter into "discussions" with civil servants employed by the Department of Natural Resources Air Quality Division (DNR-AQD). These discussions, which at times include representatives of the Attorney General's office, "may culminate in proposed consent orders." According to DNR-AQD personnel, if General Motors refuses to negotiate a consent order, the division will institute enforcement proceedings and request a formal administrative hearing.

If the parties reach an agreement, an Assistant Attorney General reviews the proposed consent order which is then presented to the Air Pollution Control Commission by a DNR-AQD staff member at the Commission's regular monthly meeting. If the negotiations are unsuccessful, DNR-AQD and General Motors each present a proposed order to the Commission. In either situation, General Motors employees are available to answer questions posed by the Commissioners and members of the public. When discussions are complete, the Commission votes on entry of an appropriate order.

Your first question relating to these facts is whether "the discussions and negotiations with the DNR-AQD staff and the Attorney General's office constitutes lobbying."

Pursuant to section 5(2) of the Act (MCL 4.415), "lobbying" includes "communicating directly with an official in the executive branch of state government . . . for the purpose of influencing . . . administrative action."

Thus, lobbying occurs only if two requirements are met. First, the communication must be with an "official in the executive branch" and second, the communication must attempt to influence "administrative action."

According to section 5(9) of the Act, "official in the executive branch" includes elected or appointed members of state boards or commissions but not members of the classified civil service. You indicate that in the first step of the settlement process, General Motors communicates only with DNR-AQD "staff members who are civil servants." Consequently, General Motors' discussions and negotiations with DNR-AQD employees are not lobbying. Similarly, if the Department of Attorney General's representatives are civil servants, General Motors' communications with them are not regulated by the Act.

Your second question is whether General Motors' participation in "discussions before the Air Pollution Control Commission constitute[s] lobbying." As noted previously, members of a state commission are officials in the executive branch who can be lobbied. Therefore, if General Motors communicates with the Commission for the purpose of influencing "administrative action," it is engaged in reportable lobbying.

"Administrative action" is defined in section 2(1) of the Act (MCL 4.412) as follows:

> "Sec. 2. (1) 'Administrative action' means the proposal, drafting, development, consideration, amendment, enactment, or defeat of a nonministerial action or rule by an executive agency or an official in the executive branch of state government. Administrative action does not include a quasi-judicial determination as authorized by law."

Section 6(3) of the Act (MCL 4.416) provides that "nonministerial action" requires the exercise of personal judgment. Clearly, the Air Pollution Control Commissioners are exercising personal judgment when deciding whether a particular consent order should be implemented. Therefore, General Motors' communications with the Commission are lobbying unless the quasi-judicial exemption found in section 2(1) is applicable.

Consent orders such as you describe are entered into pursuant to section 8 of the Air Pollution Act (MCL 336.18). Sections 9 and 10 of that Act (MCL 336.19 and 336.20) provide that if a voluntary agreement is not reached within a reasonable time, a complaint may be filed, and any hearing held shall be in accordance with and subject to the contested case provisions of the Administrative Procedures Act (the "APA"), 1969 PA 206, as amended.

Section 78 of the APA (MCL 24.278) provides for the disposition of contested cases by stipulation, agreed settlement, consent order or other mutually acceptable methods. Thus, it appears that the Air Pollution Act, while expressing a preference for settlement agreements, merely incorporates the APA's contested case procedures. (The Air Pollution Act was amended subsequent to enactment of

the APA.) It must therefore be concluded that consent orders approved by the Air Pollution Control Commission are part of the contested case process authorized by the Air Pollution Act and the APA.

Contested cases fall squarely within the quasi-judicial exemption established in section 2(1) of the lobby act. Thus, in answer to your question, General Motors' communications with the Air Pollution Control Commission regarding proposed consent orders are not lobbying under the Act.

This response is a declaratory ruling relating to the specific facts and questions you have presented.

Very truly yours,

Richard H. Austin
Secretary of State

RHA/cw

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

August 29, 1984

Mark J. Bertler
Public Affairs Coordinator
Planned Parenthood Affiliates of Michigan
P.O. Box 19104
Lansing, Michigan 48901

Dear Mr. Bertler:

This is in response to your inquiry concerning applicability of the lobby act (the Act), 1978 PA 472, to members of Planned Parenthood Affiliates of Michigan (PPAM).

Specifically, you indicate PPAM is a membership organization and a registered lobbyist. You ask whether PPAM members must "count their dues amount towards their lobbying threshhold." You also ask whether "lobbying activities and/or expenditures undertaken by individual members will count towards registration threshholds as a lobbyist or lobbyist agent."

Sections 5 and 7 of the Act (MCL 4.415 and 4.417) require a person who expends more than $1,000 for lobbying, or more than $250 on lobbying a single public official, in any 12 month period to register as a lobbyist. In addition, a person who receives more than $250 in compensation or reimbursement for lobbying must register as a lobbyist agent.

Certain individuals, however, are exempt from these requirements. In particular, section 5(7)(d) provides:

> "Sec. 5. (7) Lobbyist or lobbyist agent does not include:
>
> (d) A member of a lobbyist, if the lobbyist is a membership organization or association, and if the member of a lobbyist does not separately qualify as a lobbyist under subsection (4)."

This section indicates that when a membership organization is registered as a lobbyist, its members are not subject to the Act's registration and reporting requirements unless they "separately qualify" as lobbyists. As noted previously, a person qualifies as a lobbyist by expending more than $1,000 for lobbying or more than $250 on lobbying a single public official.

In answer to your questions, PPAM members are not required to count the dues they pay toward the threshholds established in sections 5(4) and 5(5). Membership alone does not trigger the Act's reporting requirements. However, an individual member may become a lobbyist by making independent expenditures of more than $1,000 for lobbying or more than $250 on lobbying a single public official. Of course, a member may also become a lobbyist agent if the member receives more than $250 in compensation or reimbursement for lobbying from a source other than PPAM.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

35-84-LI

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

September 4, 1984

Richard D. McLellan
Dykema, Gossett, Spencer, Goodnow & Trigg
800 Michigan National Tower
Lansing, Michigan 48933

Dear Mr. McLellan:

This is in response to your request for a declaratory ruling concerning applicability of the lobby act (the Act), 1978 PA 472, to Floyd L. Costerisan and other members of his accounting firm.

At the time of your inquiry, Mr. Costerisan was a member of the State Board of Accountancy and a public official for purposes of the Act. Mr. Costerisan, other members of his firm, and the firm itself intended to register as lobbyist agents under the Act. You ask the Secretary of State to interpret the Act in a manner consistent with three "statement[s] of legal issue[s]." For purposes of discussion, these statements are rephrased as questions and answered below.

You first ask whether the accounting firm, as a lobbyist agent, is required to report the total compensation it pays to Mr. Costerisan as a financial transaction. As stated in the attached letter to Mr. Peter H. Ellsworth, dated July 20, 1984, the ordinary course of business exemption found in section 8(1)(c) of the Act (MCL 4.415) clearly applies only to lobbyists. Therefore, if a professional corporation is registered as a lobbyist agent, compensation "having value of at least $500.00" which the corporation pays to a member who is a public official must be reported under the Act.

Your second question is whether the accounting firm is required to report "incidental meals provided for Mr. Costerisan in the course of his employment . . . when such meals are unrelated to his service as a member of the State Board of Accounting." Responding to a similar question from Consumers Power Company, the Department stated in a February 22, 1984, letter to Mr. George F. Hill:

> "Section 8(1)(b)(i) and rule 56, 1981 AACS R4.456, require a lobbyist to report expenditures for food and beverages provided for public officials. There is no exemption for food and beverage expenditures incurred in the ordinary course of business or for non-lobbying purposes. The reason for this approach, as explained by the Court of Appeals in its discussion of financial transactions in Pletz v Secretary of State, 125 Mich App 335 (1983), is that food and beverage expenditures 'even where unrelated to a particular policy issue, may

affect the recipient's inclination on matters of interest to the lobbyist.'

This rationale does not apply to an employer/lobbyist who provides food and beverage to an employee while 'conducting company business.' Payment or reimbursement of meal expenses is part of the employee's ordinary compensation and does not increase the likelihood that the employee, when acting as a public official, will promote the employer/lobbyist's interests. Thus, the legislature's purpose is not served by requiring an employer, who happens to be a lobbyist, to account for food and beverages provided to its employees. Consumers Power Company is therefore not required to report food and beverage expenditures for an employee who is a public official, provided the expenditures are for food and beverage consumed by the employee in the course or scope of employment."

Section 8(1)(b)(i) and rule 56 apply equally to lobbyist agents. Consequently, any food and beverage expenditures made to Mr. Costerisan in the ordinary course or scope of his employment are not reportable by the accounting firm.

Your final question is whether "informal, reciprocal payment for recreational activities between colleagues" is prohibited under the Act. Specifically, you ask whether another member of the firm who is a lobbyist agent may pay "greens fees exceeding $25 in a month on behalf of Mr. Costerisan."

Section 11(2) of the Act (MCL 4.421) and rule 71, 1981 AACS R4.471, prohibit a lobbyist or lobbyist agent from giving a gift to a public official. "Gift" is defined in section 4(1) (MCL 4.414) as "a payment, advance, forbearance, or the rendering or deposit of money, services, or anything of value, the value of which exceeds $25.00 in any 1-month period, unless consideration of equal or greater value is received therefor." Significantly, the legislature chose to exempt five specific items from this definition but did not exclude payment for recreational activities between business associates. Therefore, a colleague who is a lobbyist agent may not pay greens fees for Mr. Costerisan which exceed more than $25.00 in a one month period without running afoul of the Act.

The Department of Licensing and Regulation has advised this Department that subsequent to your inquiry Mr. Costerisan resigned from the Board of Accountancy. As such, this response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

MICHIGAN DEPARTMENT OF STATE

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STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

9-84-LD

August 27, 1984

Julia D. Darlow
Dickinson, Wright, Moon, VanDusen and Freemen
121 East Allegan Street
Lansing, Michigan 48933

Dear Ms. Darlow:

This is in response to your letter requesting a declaratory ruling regarding applicability of the lobby act, 1978 PA 472 (the "Act"), to the activities of Ross Roy, Inc., in the performance of its contract with the State of Michigan.

Ross Roy, Inc., has entered into a contract with the State of Michigan through the Department of Management and Budget to coordinate the "Say Yes to Michigan!" promotion program. The Department of Commerce is the agency with primary responsibility for administering the advertising campaign. However, the Request for Proposals ("RFP") which solicited bids on the contract makes it clear that "the program serves a cross-section of State government." Specifically, the RFP indicates the "promotion plan . . . is comprehensive, cutting across programs within departments of state government, between departments, and reaching out to the private sector."

Ross Roy's duties under the contract are summarized in your letter as follows:

> "Ross Roy's advertising responsibilities include, but are not limited to, things such as developing an annual plan; recommending and conducting market research studies; media planning, purchasing and evaluation; preparation and participation, plus providing advice and counsel, in presentations to the executive branch, the legislature and citizens' groups. Publicity includes conducting analyses of news and public affairs coverage of tourism and economic development related promotion programs, identifying promotion opportunities, preparation of articles and background materials, and placement in national business and consumer media. Marketing services include development of specialized marketing plans and production of materials, assistance in training staff of Department of Commerce in sales presentation and consultation techniques, evaluation of target presentation and consultation techniques, evaluation of target industry sales efforts, and

> assistance in logistics of planning, placement and maintenance of all tourism, industrial and agricultural exhibits at trade shows."

In the course of carrying out these duties, Ross Roy's employees engage in direct communications with public officials in a number of agencies. You request the issuance of a declaratory ruling in response to three questions, which are set out below.

> "(1) Would any contacts Ross Roy may have with public officials in the Department of Commerce and the Office of Management and Budget with respect to matters relating to extension of its Contract constitute lobbying, and would Ross Roy thereby qualify as a lobbyist?"

The Department is unable to provide a specific answer to this question without additional information. However, the following discussion is provided for your guidance.

Pursuant to section 5(2) of the Act (MCL 4.415), "lobbying" includes "communicating directly with an official in the executive branch of state government . . . for the purpose of influencing . . . administrative action." Thus, two matters must be considered to determine whether lobbying occurs: who is the object and what is the subject of the communication. Your question indicates the object of Ross Roy's communications concerning its contract extension is an "official in the executive branch." Therefore, lobbying takes place only if the decision to extend or modify the contract, i.e., the subject of the communication, is an "administrative action."

According to section 5(9) of the Act, "official in the executive branch" means an elected state officeholder, a member of any state board or commission, or an unclassified employee serving in a policymaking capacity. "Administrative action", as defined in section 2(1) (MCL 4.412), includes only "nonministerial action." "Nonministerial action" in turn is defined in section 6(3) (MCL 4.416) as "an action other than an action which a person performs in a prescribed manner under prescribed circumstances in obedience to the mandate of legal authority, without the exercise of personal judgment regarding whether to take the action."

The Secretary of State and the Attorney General argued in their successful defense of the statute in Pletz v Secretary of State, 125 Mich App 335 (1983), that given the above definitions, the lobby act applies only to communications with policymakers which are intended to influence policy matters. Therefore, if the decision to extend Ross Roy's contract requires the formation of policy or a judgment concerning the manner in which a particular policy should be applied, communications regarding the contract's extension are lobbying and subject to the Act. However, if no policy decision is required, communications concerning renewal of the contract are not lobbying and do not qualify Ross Roy as a lobbyist.

Questions 2 and 3 relate to communications in the course of performing the contract and will be treated together.

"(2) Do Ross Roy's communications with public officials in the Department of Commerce in performance of its Contract duties constitute lobbying, and does Ross Roy thereby qualify as a lobbyist agent for the Department of Commerce?

(3) Do Ross Roy's communications with public officials outside of the Department of Commerce and the Office of Management and Budget in performance of its Contract duties constitute lobbying, and does Ross Roy thereby qualify as a lobbyist agent for the Department of Commerce?"

Section 5(5) of the Act provides that a "lobbyist agent" is a "person who receives compensation or reimbursement of actual expenses, or both, in a combined amount in excess of $250.00 in any 12-month period for lobbying." The issue raised by your second and third questions is whether an independent contractor who is required to communicate with public officials to fulfill its contractual obligations is a person who is compensated or reimbursed for lobbying.

The Department has consistently interpreted "lobbying" to exclude communications between state employees and the public officials for whom they work. As explained in a letter to Senator John Engler, dated March 1, 1984, the Act was not intended to interfere with open and frank communications which an employee is expected to engage in as part of the employment contract. Thus, employee-employer communications are not reportable under the Act. However, a state employee who attempts to influence policy by communicating with a public official in another department or autonomous agency (including an agency within the employee's own department) is lobbying and subject to the Act's requirements.

An independent contractor such as Ross Roy is similar to a state employee in that it communicates with public officials not by choice but to fulfill its legal obligations under an existing contract. Any benefit resulting from a subsequent policy decision accrues to the State rather than to Ross Roy. Unlike a traditional lobbyist, Ross Roy is not attempting to further its own interests by communicating with policymakers about policy matters.

It must therefore be concluded that communications by a contractor with public officials in the course of carrying out the terms of its contract are not lobbying regulated by the Act. Requiring registration and reporting of such communications may interfere with the performance of the contract, a result the legislature could not have intended. Moreover, as you point out, disclosure regarding details of the contract and payments made to the contractor remains available under the Freedom of Information Act.

You indicate that while Ross Roy's contract is administered by the Department of Commerce, it is actually an agreement with the State which serves a cross-section of state government and not a single agency. As such, the "public officials for whom [Ross Roy] works" include officials in each department or agency

and not simply those charged with administering the Department of Commerce. Therefore, in answer to your second and third questions, Ross Roy does not qualify as a lobbyist agent by communicating in the performance of its contract with public officials in either the Department of Commerce or officials outside of that Department.

This interpretation does not apply to the situation in which a state agency employs a contractor to engage in lobbying on behalf of the agency. Like employees who are compensated for lobbying, a contractor who is paid or reimbursed for lobbying is subject to the registration and reporting provisions of the Act.

The response to questions 2 and 3 is a declaratory ruling relating to the specific facts you have presented. However, the response to question 1 is informational only because the underlying statement of facts was not clear, concise and complete as required by rule 3, 1981 AACS R4.413.

Very truly yours,

Richard H. Austin
Secretary of State

RHA/cw

Enc.

37-84-LI

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

September 12, 1984

Joel Boyden
Michigan Association of the Professions
230 N. Washington Square, Suite H
Lansing, Michigan 48933

Dear Mr. Boyden:

This is in response to your request for an interpretation of the lobby act (the Act), 1978 PA 472, as it applies to the lobbying activities of members of organizations which form the Michigan Association of the Professions.

The Michigan Association of the Professions (MAP) consists of eleven professional organizations including, for example, the State Bar of Michigan, the Michigan Society of Architects, and the Michigan Dental Association. Each constituent organization is composed of individuals licensed to engage in a particular profession. These individuals "are employed by a wide range of employers including corporations, non-profit organizations, educational institutions, governmental units, partnerships, professional corporations and sole proprietorships."

Many individual members voluntarily engage in lobbying on behalf of their professional organizations. Some of the lobbying occurs at times when the members are compensated by their employers and may exceed $250 in a 12 month period. In addition, the members may be reimbursed by their professional organizations "for food and beverage provided to public officials in the course of communicating with the official with respect to pending legislative or administrative action of interest to the professional organization."

The first issue you raise in relation to these facts is whether individual members of MAP's constituent organizations who lobby on behalf of the organizations are subject to the Act's registration and reporting requirements.

"Lobbying" is defined in section 5(2) of the Act (MCL 4.415) as "communicating directly with an official in the executive branch of state government or an official in the legislative branch of state government for the purpose of influencing legislative or administrative action."

Sections 5(5) and 7(2) of the Act (MCL 4.417) require any person who receives compensation or reimbursement of more than $250 in a 12 month period for lobbying to register as a lobbyist agent. However, certain persons are exempt from this requirement. In particular, section 5(7)(d) provides:

> "Sec. 5. (7) Lobbyist or lobbyist agent does not include:
>
> (d) A member of a lobbyist, if the lobbyist is a membership organization or association, and if the member of a lobbyist does not separately qualify as a lobbyist under subsection (4)."

This section indicates that if the professional organizations or associations which comprise MAP are registered as lobbyists, individual members opf the association who are compensated for lobbying on behalf of the organizations or associations are not required to register as lobbyist agents. However, a member who makes independent expenditures for lobbying may become a lobbyist upon meeting the spending thresholds established in section 5(4). In addition, a member who lobbies for another organization may be required to register as a lobbyist agent for that organization.

The second issue you raise is whether employers are required to report compensation paid to employees for time spent lobbying on behalf of the employee's professional organizations. In the attached letter to Mr. Rossi Ray Taylor, dated July 13, 1984, the Department responded to a similar question as follows:

> "An employer does not engage in direct, express and intentional communications which are specifically intended to influence a public official's actions simply by paying employees for time which the employees may spend lobbying on behalf of independent associations or organizations. Reportable lobbying occurs only if the employer directs or controls the employee's lobbying activity. Whether the employer exercises direction or control depends upon a variety of factors. For example, paying the employee's membership dues for an organization suggests the employer may have some control over the employee's communication for lobbying."

You assert in your letter that employers of persons who belong to and lobby for MAP's constituent organizations do not direct or control their employee/members' lobbying activities. If that is the case, the employers are not required to report the compensation paid to the employee/members as expenditures for lobbying. However, you also indicate that "the participation by members in professional organizations involves various degrees of encouragement or discouragement from employers, including mere tolerance to active encouragement." There may be situations where an employer's "active encouragement" results in direction or control of the employee/member's communications for lobbying. This can only be determined on a case by case basis.

Your final question concerns the reporting obligations of the professional organizations themselves. As indicated previously, the professional organizations

may reimburse members for food and beverage provided to public officials in the course of communicating with those officials for the purpose of influencing legislative or administrative action.

Section 8(1)(b) of the Act (MCL 4.418) provides that a lobbyist must file biannual reports which include "an account of all expenditures made by a lobbyist, lobbyist agent, or representative of a lobbyist." "Representative of a lobbyist" is defined in pertinent part as follows:

> "Sec. 5. (6) 'Representative of the lobbyist' means any of the following:
>
> (b) For the purposes of section 8(1)(b)(i) and 9(1)(b), a member of the lobbyist or employee of a member of the lobbyist, when the lobbyist is a membership organization or association, and when the lobbyist agent or an employee of the lobbyist or lobbyist agent is present during any part of the period during which the purchased food or beverage is consumer." (emphasis added)

Sections 8(1)(b)(i) and 9(1)(b) (MCL 4.419) require the disclosure of expenditures for food and beverage provided to public officials "if the expenditures for that public official exceed $25.00 in any month covered by the report or $150.00 during that calendar year from January 1 through the month covered by the report." Therefore, a professional organization must include reimbursement paid to its members when calculating or reporting food and beverage expenditures under the Act. In reporting such reimbursement on current forms, the lobbyist would indicate the expenditures under "all other expenses."

This response is informational only and does not constitute a declaratory ruling because none was requested.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

38-84-LI

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING

MICHIGAN 48918

September 12, 1984

Mr. Ivan E. Estes
Personnel Director
Department of Mental Health
Lewis Cass Building
Lansing, Michigan 48926

Dear Mr. Estes:

This is in response to your request for an interpretation of the applicability of the lobby act (the "Act"), 1978 PA 472, to your contacts with certain public officials.

As Personnel Director of the Department of Mental Health ("DMH") you are a classified civil servant who communicates directly with the Civil Service Commissioners and the Director of the Office of the State Employer. You indicate you appear before the Civil Service Commission representing DMH at grievance hearings and at public meetings discussing Civil Service rule changes.

As it relates to your situation, lobbying is defined in the Act as communicating directly with a public official for the purpose of influencing administrative action (section 5(2), MCL 4.415). Administrative action is defined in section 2(1) of the Act (MCL 4.412) as meaning:

> "the proposal, drafting, development, consideration, amendment, enactment, or defeat of a nonministerial action or rule by an executive agency or an official in the executive branch of state government. Administrative action does not include a quasi-judicial determination as authorized by law."

Grievance hearings before the Civil Service Commission are quasi-judicial proceedings specifically excluded from the definition of administrative action. Thus you are not lobbying when you represent DMH at grievance hearings.

Rulemaking is expressly included within the definition of administrative action. All your direct communication with public officials in another state agency concerning the adoption, defeat, or repeal of a rule or concerning what should or should not be included in a rule is lobbying. Should you be compensated or

reimbursed in excess of $250.00 for lobbying, you will become a lobbyist agent and must register with the Department of State.

You indicate your communications with John Bruff, the Director of the Office of the State Employer, relate to "matters of labor relations such as negotiations, contract interpretations, etc." Since the Department cannot anticipate what is covered by "etc.", this response will only consider your communications with Mr. Bruff on labor negotiations and contract interpretations.

The Office of the State Employer is a part of the Department of Management and Budget. Executive Orders 1979-5 and 1981-3 create that Office and give its director considerable employment relation duties, including:

1) Representing departments and agencies before the Civil Service Compensation Hearings Panel.

2) Determining which matters are subject to meet and confer negotiations.

3) Representing the employer in primary negotiations.

4) Determining which issues are the subject of primary negotiations and which are the subject of secondary negotiations.

5) Representing the employer in dispute resolution.

Civil Service rule 6-2.1(21) when read with the executive orders indicates Mr. Bruff represents the principal departments in collective bargaining. Civil Service rule 6-4.2 further clarifies that Mr. Bruff has primary responsibility for developing management's employment policies.

In the area of labor negotiations and contract interpretations the personnel divisions of the principal departments and the Office of the State Employer work together as a team. Both you and Mr. Bruff represent management. You develop your positions and strategies together. In these areas of concern your division and the Office of the State Employer are really one entity. Your relationship to Mr. Bruff is similar to your relationship to the Director of Mental Health. Your communications with Mr. Bruff concerning labor negotiations and contract interpretations cannot be lobbying because a department or an entity cannot lobby itself. Therefore, your communications with Mr. Bruff on those subjects are not covered by the Act.

In conclusion, of the types of communication about which you have specifically inquired, only commenting on rules is lobbying which must be reported under the Act.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

September 19, 1984

Mr. James P. Hallan, General Counsel
Michigan Food Dealers Service Corp.
209 Seymour Avenue
Lansing, Michigan 48933

Dear Mr. Hallan:

This is in response to your request for a declaratory ruling concerning the provisions of the lobby act, 1978 PA 472 (the "Act"). You advise the Michigan Food Dealers Service Corp. is "a wholly owned, for-profit subsidiary of the Michigan Food Dealers Association" which you describe as a "non-profit trade association" which is a "registered lobbyist" pursuant to the Act. The Association publishes a monthly newspaper called the Michigan Food News which has "a subscription of over 5000." and which "on a regular basis . . . runs feature stories on public officials." Before the effective date of the Act the Michigan Food Dealers Service Corp. "would present these featured public officials with a framed silver print or plate of the news article. The cost to the Michigan Food Dealers Service Corp. for framing the silver-print approximately ranged from $40-$100, depending on the size of the article." Your specific inquiry concerns an interpretation of the word "Gift" in sections 4 and 11(2) of the Act (MCL 4.414 and 4.421(2)) and you ask if the Michigan Food Dealers Service Corp. would be in violation of the Act "if they continued to provide public officials with framed articles which have an initial cost of over $25.00 or is the value of the framed article to be determined by whether the recipient could sell it in the open market for more than $25.00.?"

On January 31, 1984, this Department directed an interpretive statement to Mr. James S. Mickelson, ACSW (5-84-CI) which assists in resolving the question you raise. A copy is enclosed for your information. In this statement the Department stated its position as follows:

> "Clearly the definition of 'gift' as used in the Act contemplates that the particular item have an intrinsic value in and of itself. The type of plaque you describe is a symbolic citation or award based upon merit as determined by your organization. Clearly it was not the intent of the Act to discourage symbolic recognition of commendable public service. Therefore, while the plaque you describe may have

cost more than $25.00, its intrinsic value is substantially less, and therefore it is the department's belief that awards should not be classified as gifts unless the intrinsic or actual value is $25.00 or more.

One possible test could be the value of the plaque in the open market, i.e. could the recipient sell it for more than $25.00? The type of plaque you describe, although costing more than $25.00, could most likely not be sold for more than $25.00 and, therefore, is not a gift. Should a 'plaque' consist of an item with intrinsic value clearly greater than $25.00, the item will be considered as being a gift, the donation of which is prohibited by section 11(2) of the Act."

In short, the response to your specific inquiry, as we advised in the letter to Mr. Mickelson, is that one acceptable test of the value of what would otherwise be a prohibited "gift" is whether or not the recipient could sell it for more than $25.00 on the open market.

The above is not a declaratory ruling because of the absence of specific facts concerning the issues discussed above.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

Enc.

40-84-LI

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING

MICHIGAN 48918

September 20, 1984

T. E. Metevier
Chrysler Corporation
Office of Government Affairs
P.O. Box 1919
Detroit, Michigan 48288

Dear Mr. Metevier:

This is in response to your inquiry concerning applicability of the lobby act (the "Act"), 1978 PA 472, to the administrative process required to secure a permit. Your questions relating to certain Chrysler Corporation business practices are answered in a separate letter.

You indicate that Chrysler Corporation is often required to obtain a permit from a state agency or commission. The permit application submitted by Chrysler is frequently the subject of a public hearing. Your questions relating to these facts are as follows:

"Is an application for a permit 'lobbying'?

Is the appearance of a representative at such a public hearing 'lobbying'

A. if the representative attends but does not speak?
B. if the representative responds to questions asked by the hearing tribunal?
C. if the representative presents a statement orally or in writing to the tribunal?

If any of the answers to the above is 'Yes',

A. must all of the expenses in preparing the permit application be reported, including architectural drawings, engineering plans, research, etc.
B. must the expenses of preparing the statement of the representative be reported as well as his compensation for the time of travel to the site of the hearing."

The Department is unable to provide specific answers to your questions without additional information. However, the following general discussion is provided for your guidance.

"Lobbying" is defined in section 5(2) of the Act (MCL 4.415) as "communicating directly with an official in the executive branch of state government . . . for the purpose of influencing . . . administrative action." Pursuant to section 5(9), "official in the executive branch" includes elected state officeholders, members of state boards and commissions, and unclassified employees who serve in policymaking capacities. Sections 2(1) and 6(3) of the Act (MCL 4.412 and 4.416) taken together indicate that "administrative action" is any action requiring the exercise of personal judgment. Thus, in order to lobby an administrative agency, board or commission, there must be an attempt to influence discretionary action by directly communicating with an official in the executive branch.

An application for a permit may or may not be lobbying depending on the circumstances. For example, if the application is reviewed and processed by a civil servant who makes a decision concerning issuance of the permit, no lobbying occurs. On the other hand, when granting or denying an application depends upon a policy decision by an official in the executive branch, including a board or commission member, the application is considered a communication for lobbying.

Similarly, whether communicating at a public hearing is lobbying depends upon a variety of factors. Lobbying may occur only if the hearing panel includes a public official. Assuming a public official is present, a person attending the hearing engages in reportable lobbying only if he or she communicates for the purpose of influencing administrative action. (Of course, communications by a person recognized as an expert in a particular area may qualify for the "technical information" exemption found in section 5(2).) The Act makes no distinction between communications which are solicited and those which are freely initiated. Therefore, responding to questions or making an oral or written statement are treated equally under the Act.

It should also be noted that section 2(1) of the Act exempts "quasi-judicial determinations as authorized by law" from the definition of "administrative action." Thus, if the permit application or public hearing results in a quasi-judicial determination, the application or statements made at the public hearing are not lobbying because they are not for the purpose of influencing administrative action.

If the quasi-judicial exemption does not apply and Chrysler Corporation engages in lobbying either by applying for a permit under certain circumstances or communicating with a public official at a hearing, Chrysler is required to report all of its expenditures relating to the lobbying communication. Pursuant to rule 1(d)(iv), 1981 AACS R4.411, this includes any expenditure "for providing or using information, statistics, studies or analysis in communicating directly

with an official that would not have been incurred but for the activity of communicating directly." Consequently, expenditures made while preparing to lobby must be reported by the lobbyist. However, according to rule 1(1)(d)(iii) and rule 1(1)(i), the cost of travel, lodging and meals away from home are not reportable lobbying expenditures.

This response is informational only and does not constitute a declaratory ruling. A declaratory ruling will be issued upon receipt of a clear, concise and complete statement of facts as required by rule 3(2), 1981 AACS R4.413.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

IQ-84-LD

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

September 20, 1984

T. E. Metevier
Chrysler Corporation
Office of Government Affairs
P.O. Box 1919
Detroit, Michigan 48288

Dear Mr. Metevier:

This is in response to your questions concerning applicability of the lobby act (the "Act"), 1978 PA 472, to certain business practices of Chrysler Corporation. A third question relating to statutorily required permits is addressed in a separate letter.

You indicate that as a matter of policy Chrysler Corporation makes demonstration vehicles available on a "short term courtesy loan basis to a number of people who will give the product high visibility." The vehicles are generally loaned without charge to a diverse group of people, including persons who are public officials as defined in section 6(2) of the Act (MCL 4.416). The market value of each loan is "invariably in excess of $25." You ask whether loaning a vehicle to a public official under a program conducted in the ordinary course of business is prohibited under the Act.

In addition, Chrysler Corporation occasionally arranges for a dealer to sell vehicles at discounted prices to "Certain Designated Individuals" (CDI), who it is believed will "provide Chrysler with high product visibility and . . . benefit our sales promotion and advertising efforts." The discounted price is determined by a formula which is the same for all individuals in the CDI class. The class includes vendors, community and civic leaders, charitable or educational institution leaders, and public officials as defined in section 6(2). Your second question is whether the Act prohibits "a CDI sale to a 'public official' made in the ordinary operation of the CDI program."

Section 11(2) of the Act (MCL 4.422), and rule 71, 1981 AACS R4.471, indicate that a lobbyist or lobbyist agent may not give a gift or loan to a public official. Specifically, section 11(2) states:

"Sec. 11. (2) A lobbyist or lobbyist agent or anyone acting on behalf

> of a lobbyist or lobbyist agent shall not give a gift or loan, other than a loan made in the normal course of business by an institution as defined in section 5 of Act No. 319 of the Public Acts of 1969, as amended, a national bank, a branch bank, an insurance company issuing a loan or receiving a mortgage in the normal course of business, a premium finance company, a mortgage company, a small loan company, a state or federal credit union, a savings and loan association chartered by this state or the federal government, or a licensee as defined by Act No. 27 of the Public Acts of the Extra Session of 1950, as amended. For the purpose of this section, a preferential interest rate shall not be given solely on the basis of the credit applicant being a public official or a member of the public official's immediate family. A person who gives a gift in violation of this subsection is guilty of a misdemeanor if the value of the gift is $3,000.00 or less, and shall be punished by a fine of not more than $5,000.00, or imprisoned for not more than 90 days, or both, and if the person is other than an individual the person shall be fined not more than $10,000.00. A person who knowingly gives a gift in violation of this subsection and the value of the gift is more than $3,000.00 is guilty of a felony and if the person is an individual shall be punished by a fine of not more than $10,000.00, or imprisoned for not more than 3 years, or both, and if the person is other than an individual shall be punished by a fine or not more than $25,000.00."

"Gift" is defined in section 4(1) of the Act (MCL 4.114) as anything valued at more than $25.00 in a one month period, unless consideration of equal or greater value is received therefor. Pursuant to section 4(1)(b), "gift" does not include a "loan made in the normal course of business" by those lending institutions identified in section 11(2). According to section 4(3), a "loan" is a transfer of "anything of ascertainable value in exchange for an obligation, conditional or not, to repay in whole or in part."

The above provisions indicate that a lobbyist or lobbyist agent is completely prohibited from giving a gift or loan to a public official, unless the lobbyist or lobbyist agent is a bank, savings and loan association, or other lending institution making a loan in the normal course of business. There is no "ordinary course of business" exception for lobbyists or lobbyist agents who are not in the business of lending money to creditworthy applicants. Chrysler Corporation, as a manufacturer of motor vehicles, does not fall within the narrow exception created by section 11(2). Therefore, Chrysler Corporation may not give a gift or loan to an official in the legislative or executive branch of state government, even though it is in the ordinary course of Chrysler's business.

According to the facts you have provided, Chrysler Corporation routinely loans vehicles without charge to public officials on a short term basis. In addition, Chrysler occasionally arranges to sell a vehicle to a public official at a discounted price. If, as you indicate, the value of the loan or discount

exceeds $25.00 in a one month period, the loan or discount is a gift which is prohibited under the Act. Thus, Chrysler Corporation, even though acting in the ordinary course of its business, may not loan a vehicle to a public official under the circumstances you have described or arrange to sell a car to a public official at a discounted price not available to the general public.

It should be noted, however, that the prohibition found in section 11(2) applies only to gifts or loans made to public officials. There is nothing in the Act which prevents Chrysler Corporation from giving or loaning a vehicle to the State itself or to another governmental unit.

This response is a declaratory ruling relating to the specific facts and questions you have presented.

Very truly yours,

Richard H. Austin
Secretary of State

RHA/cw

41-84-LI

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING

MICHIGAN 48918

September 27, 1984

Kurt Kimball
Assistant City Manager
300 Monroe Avenue, N.W.
Grand Rapids, Michigan 49503

Dear Mr. Kimball:

This is in response to Jan Perkin's inquiry concerning applicability of the lobby act (the Act), 1978 PA 472, to communications between City of Grand Rapids' employees and the Job Development Authority.

The Job Development Authority (JDA) consists of nine members who are "officials in the executive branch" as defined in section 5(9) of the Act (MCL 4.415). Housed within the Department of Commerce, JDA was established to promote full employment and to maximize economic growth in Michigan. To this end, JDA is authorized by section 13 of 1975 PA 301 (MCL 125.1713) to provide financing to creditworthy applicants through direct loans or "loan guarantees and participations in cooperation with financial institutions," including economic development corporations.

To facilitate implementation of its enabling statute, JDA and the City of Grand Rapids have entered into a "memorandum of understanding." According to the executive director of JDA, William Cochran, this agreement provides that city employees may assist private sector applicants in completing loan applications and assembling necessary documents in exchange for a percentage of JDA fees. At times, the employees accompany the applicants to public sessions of the JDA, where the loan applications are presented for approval. The City asks whether employees who attend JDA meetings are required to register as lobbyist agents under the Act.

"Lobbyist agent" is defined in section 5(4) of the Act as "a person who receives compensation or reimbursement of actual expenses, or both, in a combined amount in excess of $250.00 in any 12-month period for lobbying."

Pursuant to section 5(2), "lobbying" includes "communicating directly with an official in the executive branch of state government . . . for the purpose of influencing . . . administrative action." According to section 2(1) (MCL

4.412), "administrative action" is "the proposal, drafting, development, consideration, amendment, enactment, or defeat of a nonministerial action or rule by an executive agency or an official in the executive branch of state government" but does not include a quasi-judicial determination as authorized by law.

Both William Cochran and the City of Grand Rapids' development manager, Ned Zimmerman, have indicated that city employees who attend JDA sessions do not necessarily communicate with the board. The employee's role is limited to providing technical information in response to questions from JDA members. Technical matters are raised infrequently and in general the only persons who communicate with the JDA are the loan applicants themselves. In these circumstances, city employees are not engaged in direct communications with public officials for the purpose of influencing administrative action, and the employees are not required to register as lobbyist agents.

In her letter, Ms. Perkins also asks whether an attorney who represents clients before the JDA is subject to the Act's requirements. A specific answer to this question cannot be provided because the attorney's role is not clearly explained. However, the Department has previously indicated in a letter to Senator John Kelly, dated April 25, 1984, that the Act does not apply to an attorney who is engaged in an activity for which a Michigan license is required. A copy of the Kelly letter, which answered a series of questions concerning attorneys, is enclosed for your use.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

Enc.

42-84-LI

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

September 27, 1984

Honorable William A. Sederburg
805 Farnum Building
Lansing, Michigan 48909

Dear Senator Sederburg:

This is in response to your request for a declaratory ruling concerning the applicability of the lobby act (the Act), 1978 PA 472, to persons from whom you regularly seek advice.

Specifically, you indicate:

> "In my role as State Senator for the Twenty-fourth District, I have often called upon respected members of the community to serve on advisory committees to provide me with advice and assistance in their areas of expertise. I currently seek advice from the advisory groups covering the following areas, all of which were set up at my instigation and meet at my request: the arts; Michigan State University; agriculture; and K-12 education. The membership of these groups includes individuals who are employed by lobbyists (i.e. MSU) but are not compensated or reimbursed for any activities relating to lobbying. I also at times have sought advice from personal friends who happen to be employed by a lobbyist - such as MSU professors - in less formal settings such as individual lunch meetings, some of which meals were paid for by my companions." (Emphasis in original)

You ask whether in these circumstances your friends and advisers are "representative[s] of the lobbyist" whose expenditures must be reported by their lobbyist/employers. While not specifically stated, it is assumed your acquaintances are communicating with you for the purpose of influencing your actions as a legislator.

Pursuant to section 8(1) of the Act (MCL 4.418), a lobbyist must file reports on January 31 and August 31 of each year. With the exception of food and beverage expenditures, which are discussed below, section 8(1)(b) requires the lobbyist to disclose any expenditures which are "for" or "directly related" to lobbying, including those made by a "representative of the lobbyist." According to sec-

tion 5(6)(a) of the Act (MCL 4.415), "representative of the lobbyist" includes an employee of the lobbyist or lobbyist agent.

The issue raised by your inquiry is whether your friends' and advisers' expenditures can be attributed to their employers as expenditures for lobbying.

"Lobbying" is defined in section 5(2) of the Act as "communicating directly with an official in the executive branch of state government or an official in the legislative branch of state government for the purpose of influencing legislative or administrative action." According to section 5(3), "influencing" includes "promoting, supporting, affecting, modifying, opposing or delaying by any means."

In Pletz v Secretary of State, 125 Mich App 335 (1983), plaintiffs argued the definitions of "lobbying" and "influencing" were unconstitutionally vague and ambiguous. The Court of Appeals, in rejecting plaintiffs' contention, suggested the key factor in determining whether a communication is for lobbying is whether the communication is "for the purpose of influencing." The Court cited with approval a New Jersey case which defined the phrase "to influence legislation":

> "' . . . we conclude that the meaning to be ascribed to this terminology is activity which consists of direct, express, and intentional communications with legislators undertaken on a substantial basis by individuals acting jointly for the specific purpose of seeking to affect the introduction, passage, or defeat of, or to affect the content of legislative proposals.'" 125 Mich App at 130

Thus, "lobbying" as viewed by the Court of Appeals consists of direct, express and intentional communications with public officials for the specific purpose of affecting legislative or administrative action.

The Department has previously indicated in a letter to Mr. Rossi Ray Taylor, dated July 13, 1984, that an employer is not engaged in direct, express and intentional communications which are specifically intended to influence a public official's actions unless the employer directs or controls its employee's lobbying activity. The Department concluded that where direction or control is absent, the employer is not required to report compensation or reimbursement paid to an employee for time spent lobbying on behalf of an independent association or organization.

This rationale is even more compelling when determining whether the literal construction of sections 8(1)(b) and 5(6)(a) should prevail. If interpreted narrowly, these sections would require an employer to account for any expenditures made by an employee, or "representative of the lobbyist," regardless of the circumstances. Such an interpretation would lead to an absurd and unjust result, for the employer would be obligated to report expenditures by an employee which are totally unrelated to the employer's interests or concerns. Even if desireable, the employer would be unable to meet this burden because the

Act does not require an employee who is not compensated or reimbursed for lobbying to report his or her expenditures to the employer. Therefore, it must be concluded that an employee who makes expenditures while communicating with a public official cannot be a "representative of the lobbyist" whose expenditures must be attributed to and reported by his or her employer unless the employer directs or controls the employee's activity.

Whether the employer exercises direction or control depends upon a variety of factors. For example, if a person merely responds to your questions or generally represents his or her views as a member of a profession or institution, it is unlikely that the person is directed or controlled by the employer. On the other hand, if the person represents the employer's position on an issue, the employer may be directing or controlling the person's activity and closer scrutiny is required. A final determination can be made only on a case by case basis.

It should be pointed out, however, that food and beverage expenditures are treated somewhat differently under the Act. Unlike other reportable expenditures, subsections (1)(b) and (2) of section 8 require an employer/lobbyist to report any expenditure for food and beverage provided for a public official, regardless of the expenditure's purpose, if "the expenditure for that public official exceeds $25.00 in any month covered by the report or $150.00 during the calendar year from January 1 through the month covered by the report." Thus, if a friend or adviser is reimbursed by an employer for food and beverage expenditures made on your behalf, the employee is a "representative of the lobbyist" even though the initial expenditure was not directed or controlled by the employer. In these circumstances, the employer must report the reimbursement as an "other expenditure for lobbying."

This response is informational only and does not constitute a declaratory ruling because a complete statement of facts was not provided as required by rule 3(2), 1981 AACS R4.413.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

43-84-LI

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

October 3, 1984

John W. Etherton, Executive Director
Michigan Paralyzed Veterans of America
30406 Ford Road
Garden City, Michigan 48135

Dear Mr. Etherton:

This is in response to your inquiry concerning applicability of the lobby act, 1978 PA 472 (the "Act"), to the Michigan Paralyzed Veterans of America. Before discussing the issues you raise, a few definitions should be reviewed.

"Lobbyist" is defined at section 5(4) of the Act (MCL 4.415) as meaning:

> "(a) A person whose expenditures for lobbying are more than $1,000.00 in value in any 12-month period.
> (b) A person whose expenditures for lobbying are more than $250.00 in value in any 12-month period, if the amount is expended on lobbying a single public official."

The definition of "person" is found at section 6(1) of the Act (MCL 4.416) and includes " . . . a business, individual . . . firm . . . corporation . . . association . . . or any other organization or group of persons acting jointly," while "lobbying" is defined at section 5(2) of the Act:

> "'Lobbying' means communicating directly with an official in the executive branch . . . or . . .legislative branch of state government for the purpose of influencing legislative or administrative action."

It would appear you are concerned about two categories of individuals who may be involved in direct communications: first, paid employees become involved in activities which might be classified as lobbying "when testimony is requested by the state legislature on specific issues which may affect our membership or the handicapped community in general," and second, "volunteers or chapter officers (who) are only reimbursed for out of pocket expenses." You asked whether either of these groups are affected by the Act.

The first classification of employee about which you indicate concern are those paid employees whose "testimony is requested by the state legislature on specific issues which may affect (y)our membership or the handicapped community in general." With respect to this group, you should be aware of the exception in section 5(2) from the definition of "lobbying" quoted above:

> " . . . Lobbying does not include the providing of technical information by a person other than a person . . . or an employee of a person as defined in subsection (5) when appearing before an officially convened legislative committee or executive department hearing panel. As used in this subsection, 'technical information' means empirically verifiable data provided by a person recognized as an expert on the subject area. . . ."

If your paid employees meet the requirements of this section, they are not lobbying. This would seem to mean that such employees must be "recognized as expert(s) in the subject area" and must be providing "empirically verifiable data" to an "officially convened legislative committee or executive department hearing panel." However, a recent opinion of the Attorney General (#6231, 6/15/84) expresses the opinion that an employee of a state executive department who appears before a legislative committee or subcommittee at its request to provide information or answer questions is not required to register as a lobbyist or keep records and file reports because the employee is not influencing or lobbying the committee or subcommittee. The essence of this opinion is that while the legislature intended such employees to fall within the definition of "lobbyist agent," this will occur only when their actions are "lobbying." The opinion emphasizes that one does not, solely because of employment by a state executive department, become a lobbyist or lobbyist agent:

> "Only if that person communicates with officials in the executive or legislative branch 'for the purpose of influencing legislation' is he or she engaged in 'lobbying' and thus subject to the requirements of the Act."

The Attorney General also points out that the employee need not be subpoenaed before the committee, but may simply appear "at its request," since the employee is "only responding to the needs of the committee and is not promoting and supporting (a) bill." The opinion goes on:

> " . . . Although the information provided by the state employee may indirectly influence the committee, nonetheless, because the committee requested the information of the employee, the employee's actions are not 'made to influence' the committee to take a particular action on a proposed bill . . . . A state employee does not take on the character of a lobbyist . . . simply because the employee is cooperative, rather than requiring service of a legislative subpoena."

Because this opinion is limited by the Attorney General "to the situation where a legislative committee has requested the appearance of a State executive department employee" rather than to the paid employees of an organization such as yours, its application to your situation is unclear. We have therefore referred this question to the Attorney General for a formal opinion, and will advise you upon receiving same.

The second group you describe are "volunteers or chapter officers (who) are only reimbursed for out of pocket expenses." Section 5(7)(d) exempts from the definition of lobbyist or lobbyist agent "A member of a lobbyist if the lobbyist is

a membership organization or association, and if the member of a lobbyist does not separately qualify as a lobbyist under subsection (4)." Assuming that the "volunteers or chapter officers" are members of your organization, and assuming that the Michigan Paralyzed Veterans of America is a membership organization or association which is a lobbyist (i.e., meets the requirements of section 5(4) of the Act), the "volunteers or chapter officers" are exempt from the requirements of the Act, except as noted below, unless they separately qualify as lobbyists under subsection (4) (i.e., make expenditures for lobbying of more than $1,000 in value in any 12 month period or more than $250 in a 12 month period if expended in lobbying a single public official.)

You should be advised that section 5(6)(b) defines "representative of the lobbyist" for purposes of sections 8(1)(b)(i) and 9(1)(b) (MCL 4.418 and 4.419) as:

> ". . . a member of the lobbyist or employee of a member of the lobbyist, when the lobbyist is a membership organization or association, and when the lobbyist agent or an employee of the lobbyist or lobbyist agent is present during any part of the period during which the purchased food or beverage is consumed."

Sections 8(1)(b)(i) and 9(1)(b) require the reporting of food and beverage provided for public officials. Therefore, a membership organization which is registered as a lobbyist must report any expenditures its members make for food and beverage, and for which it reimburses them, as specified in section 8(2).

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

October 10, 1984

Conrad L. Mallett, Jr.
Director, Legal and Governmental Affairs
Office of the Governor
State Capitol
Lansing, Michigan 48909

Dear Mr. Mallett:

This is in response to your inquiry concerning applicability of the lobby act (the Act), 1978 PA 472, to employees of the Department of Social Services in two hypothetical situations, which are set out and answered below.

I. "Legislator A telephones county director B requesting factual information on pending legislation. The department has taken a position on the legislation. The facts given by B tend to support the department's position. Is the information provided to A . . . an activity in support of lobbying? B is not a lobbyist agent."

Pursuant to section 5(2) of the Act (MCL 4.415), "lobbying" includes "communicating directly with . . . an official in the legislative branch of state government for the purpose of influencing legislative or administrative action." According to section 5(3), "influencing" includes "promoting, supporting, affecting, modifying, opposing or delaying by any means."

In Pletz v Secretary of State, 125 Mich App 335 (1983), plaintiffs argued the definitions of "lobbying" and "influencing" were unconstitutionally vague and ambiguous. The Court of Appeals, in rejecting plaintiffs' contention, suggested the key factor in determining whether a communication is for lobbying is whether the communication is "for the purpose of influencing." The Court cited with approval a New Jersey case which defined the phrase "to influence legislation":

> "' . . . we conclude that the meaning to be ascribed to this terminology is activity which consists of direct, express, and intentional communications with legislators undertaken on a substantial basis by individuals acting jointly for the specific purpose of seeking to affect the introduction, passage, or defeat of, or to affect the content of legislative proposals.'" 125 Mich App at 130

Thus, "lobbying" as viewed by the Court of Appeals consists of direct, express and intentional communications with public officials for the specific purpose of affecting legislative or administrative action.

A state employee who is contacted by a legislator and asked to provide purely factual information on pending legislation is not directly, expressly and intentionally communicating with a public official for the purpose of influencing that official's actions. While the information provided may indirectly affect the legislator's position on an issue, the employee is not engaged in reportable lobbying activity.

However, if the employee's response includes a discussion of the Department of Social Services' position on a pending matter, the employee is communicating for the purpose of influencing legislative action. Communications of this nature are lobbying and must be accounted for by the Department and the employee as provided by the Act.

II. "Lobbyist agent A attends a legislative hearing on pending legislation. The lobbyist agent's employee, E, accompanies lobbyist agent A to the hearing. The department has taken a position on the legislation. Legislator L asks a question of A which A is unable to answer. A requests that E respond to the question. E provides purely factual information. The facts provided to L tend to support the department's position. Is this providing technical information or is it lobbying?"

In OAG No. 6231, dated June 15, 1984, the Attorney General responded to a similar question from Representative Richard A. Young. Specifically, Representative Young asked whether a state employee who appears before a legislative committee at its request in order to provide information or answer questions is engaged in reportable lobbying activity. The Attorney General concluded:

> " . . . where a state executive employee appears before a legislative committee upon its request to furnish information or answer questions, such actions are <u>not</u> considered lobbying, since the state employee is only responding to the needs of the committee and is not promoting and supporting the bill. Although the information provided by the state employee may indirectly influence the committee, nonetheless, because the committee requested the information of the employee, the employee's actions are not 'made to influence' the committee to take a particular action on a proposed bill. (Citation omitted)
>
> A state executive department employee appearing voluntarily at a meeting of a legislative committee, at its request, for the sole purpose of furnishing information requested by the committee or to answer questions, would be doing no more than what would be done by an employee in response to a subpoena to appear before the committee or subcommittee to provide the information needed. A state employee does not take on the character of a lobbyist, requiring registration,

> periodic reporting and record keeping, subject to criminal penalty, simply because the employee is cooperative, rather than requiring service of a legislative subpoena." (Emphasis in original)

If the employee in your hypothetical attended the hearing at the committee's request, the employee is "doing no more than what would be done . . . in response to a subpoena." That is, the employee is simply providing factual information in response to the needs of the legislature. In these circumstances, the employee is not intentionally communicating with the committee for the purpose of influencing legislative action, and neither the Department of Social Services nor the employee is required to report the activity.

If the employee did not attend at the committee's request, it should be noted that an employee who provides information to a committee may qualify for the "technical information" exemption found in section 5(2) of the Act and referred to in your letter. Section 5(2) specifically exempts "the providing of technical information" by a person recognized as an expert in the subject area "when appearing before an officially convened legislative committee or executive department hearing panel." "Techincal information" is defined to mean "empirically verifiable data provided by a person recognized as an expert in the subject area to which the information provided is related."

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

45-84-LI

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING

MICHIGAN 48918

October 16, 1984

Ms. Wilma E. Randall
Administrative Assistant to the President
Mid Michigan Community College
1375 S. Clare Avenue
Harrison, Michigan 48625

Dear Ms. Randall:

This is in response to your letter requesting a ruling with respect to whether community college presidents are required to register and report pursuant to the lobby act, 1978 PA 472 (the "Act").

I am enclosing a copy of a declaratory ruling directed to Kenneth F. Light, President of Lake Superior State College and dated January 24, 1984, and an interpretive statement sent to George N. Holcomb on March 1, 1984. While relevant, neither of these documents directly answers the question you raise -- that is, whether the president(s) of community colleges are exempt from the Act.

The Community College Act of 1966, 1966 PA 331 (MCL 389.1 et seq.), provides generally that control and supervision of community college districts are vested in their Boards of Trustees. More specifically, section 124 of this Act provides, in relevant part, that the board of trustees may:

> "(a) Contract with, appoint and employ a suitable person, not a member of the board, as administrator or director of the community college . . . who shall perform such duties as the board may determine . . . .
>
> (b) Select and employ such administrative officers, teachers and employees and engage such services as shall be necessary to effectuate its purposes."

The Act provides an exemption from registration and reporting for individuals who are public officials. This exemption is found in section 5(7)(b) of the Act (MCL 4.415). The exemption is limited by section 5(7)(c). The relevant portions of these provisions are as follows:

> "Sec. 5. (7) Lobbyist or lobbyist agent does not include:

(b) All elected or appointed public officials of state or local government who are acting in the course or scope of the office for no compensation, other than that provided by law for the office.

(c) For the purposes of this act, subdivision (b) shall not include:

(i) Employees of public or private colleges, community colleges, junior colleges or universities."

The rules promulgated to implement the Act clarify the application of the exemption by defining the term "elected or appointed official of state or local government." Rule 1(1)(c), (1981 AACS R4.411), provides:

"Rule 1. (1) As used in the Act or these rules:

(c) 'Elected or appointed public officials of state or local government' means officials whose term of office is prescribed by statute, charter, ordinance, or the state constitution of 1963 or who serve at the pleasure of their appointing authority."

In the enclosed declaratory ruling to Kenneth F. Light it was pointed out that the legislative intent was to exempt individuals occupying policymaking positions from the Act's requirements. Like the presidents of colleges or universities, community college presidents appear to be the only appointees of a community college who have the wide range of duties and discretionary authority prerequisite to being exempt pursuant to 5(7)(b). Therefore, a community college president is exempt from the registration and reporting provisions of the Act, provided the president only lobbies in the course or scope of the office for no additional compensation.

This response is informational only and does not constitute a declaratory ruling.

Sincerely,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw
Enc

46-84-LI

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

October 23, 1984

John D. Niederhauser
Legislative Liaison Committee
1575 Suncrest Drive
Lapeer, Michigan 48446

Dear Mr. Niederhauser:

This is in response to your inquiry concerning applicability of the lobby act (the Act), 1978 PA 472, to the Local Public Health Legislative Liaison Committee (the Committee). Specifically, you ask whether the Committee, which is composed of representatives from a variety of local public health organizations and governmental agencies, is required to register as a lobbyist under the Act.

"Lobbying" is defined in section 5(2) of the Act (MCL 4.425) as "communicating directly with an official in the executive branch of state government or an official in the legislative branch of state government for the purpose of influencing legislative or administrative action." "Administrative action" and "legislative action" are defined in section 2(1) (MCL 4.412) and section 5(1), respectively, as follows:

> "Sec. 2. (1) 'Administrative action' means the proposal, drafting, development, consideration, amendment, enactment, or defeat of a non-ministerial action or rule by an executive agency or an official in the executive branch of state government. Administrative action does not include a quasi-judicial determination as authorized by law.
>
> Sec. 5. (1) 'Legislative action' means introduction, sponsorship, support, opposition, consideration, debate, vote, passage, defeat, approval, veto, delay, or an official action by an official in the executive branch or an official in the legislative branch on a bill, resolution, amendment, nomination, appointment, report, or any matter pending or proposed in a legislative committee or either house of the legislature. Legislative action does not include the representation of a person who has been subpoenaed to appear before the legislature or an agency of the legislature."

Pursuant to section 5(4) and 7(1) of the Act (MCL 4.417), a person including an

organization is required to register as a lobbyist if the person or organization expends more than $1,000 for lobbying, or more than $250 on lobbying a single public official, in a 12 month period. The $1,000 and $250 thresholds are calculated pursuant to rule 21, 1981 AACS R4.421, which provides:

> "Rule 21. For the purpose of determining whether a person's expenditures for lobbying are more than $1,000.00 in value in any 12-month period, or are more than $250.00 in value in any 12-month period if expended on lobbying a single public official, the following expenditures shall be combined:
> (a) Expenditures made on behalf of a public official for the purpose of influencing legislative or administrative action.
> (b) Expenditures, other than travel expenses, incurred at the request or suggestion of a lobbyist agent or member of a lobbyist, or furnished for the assistance or use of a lobbyist agent or member of a lobbyist while engaged in lobbying.
> (c) The compensation paid or payable to lobbyist agents, employees of the lobbyist, and members of a lobbyist for that portion of their time devoted to lobbying."

These provisions indicate that the Committee is required to register as a lobbyist only if two conditions are met. First, the Committee must communicate with public officials for the purpose of influencing legislative or administrative policy decisions. Second, the Committee must make related expenditures which exceed the thresholds established in section 5(4).

You state that while the primary purpose of the Committee is to exchange information and act as a clearinghouse for the legislative concerns of its constituent organizations, there is occasional "contact with members of the House and Senate. For example, on a quarterly basis, the committee sponsors a legislative breakfast inviting appropriate members of both Houses and the Governor's office to discuss items of concern." You indicate the costs of the breakfasts are generally paid on a rotating basis by one of the organizations represented on the Committee.

If, at the breakfasts, members of the Committee communicate with public officials for the purpose of influencing legislative or administrative action, the members are engaged in lobbying. Therefore, any expenditures associated with the breakfasts are subject to the Act's registration and reporting provisions. Pursuant to rule 21, if the Committee pays any breakfast expenses with its own funds, those payments must be included to determine whether the spending limitations found in section 5(4) have been met. If in any 12 month period the Committee's total expenditures for lobbying exceed $1,000, or $250 on lobbying a single public official, the Committee must register as a lobbyist and file periodic reports as required by the Act.

On the other hand, if an organization affiliated with the Committee pays for the breakfast, that organization must register as a lobbyist upon reaching the

$1,000 or $250 expenditure threshold. If the organization has previously registered with the Department, the cost of the breakfast must be reported as required by the Act.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

47-84-LI

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING

MICHIGAN 48918

November 1, 1984

Mr. William M. Brodhead
Plunkett, Cooney, Rutt, et al.
Attorneys and Counsellors at Law
900 Marquette Building
Detroit, Michigan 48226

Dear Mr. Brodhead:

This is in response to your request for a declaratory ruling concerning the applicability of the lobby act (the "Act"), 1978 PA 472, to communications between your client, an accounting and management consulting service, (the "vendor") and the State of Michigan.

The issue which concerns you is whether the Act is applicable to direct communications with public officials by persons attempting to sell services to the state on a contract basis. If the Act is applicable, then the vendors or potential vendors will be required to register and report pursuant to the Act. In addition, section 11(1) of the Act (MCL 4.421) makes it a crime for a person to be compensated for lobbying when the compensation is contingent on the outcome of administrative or legislative action.

Your three part question is set out below:

> " . . . one, do communications concerning the sale and provision of services to the State of Michgian constitute lobbying as defined in Section 5(2) of Act No. 472, Public Acts of 1978? Two, do contacts made in the course of carrying out an existing contract and which contacts include mention of other services which could be provided to the State constitute lobbying as defined in Section 5(2) of Act No. 472, Public Acts of 1978? Three, if it is determined that direct communications with public officials concerning the sale of services to the State do constitute lobbying, and if the State has agreed to contract with a specific company for some services, do communications between that company and public officials for the purpose of negotiating the specific terms of the contract constitute lobbying as defined in Section 5(2) of Act No. 472, Public Acts of 1978?"

The Department is unable to provide a specific answer to your question without additional information. However, the following discussion is provided for your guidance.

Pursuant to section 5(2) of the Act (MCL 4.415), "lobbying" includes "communicating directly with an official in the executive branch of state government . . . for the purpose of influencing . . . administrative action." Thus, two matters must be considered to determine whether lobbying occurs: who is the object and what is the subject of the communication. Your question implies the object of the vendor's communications concerning the sale of its services is an "official in the executive branch." Therefore, lobbying takes place only if the decision to purchase a specific product or service is an "administrative action."

According to section 5(9) of the Act, "official in the executive branch" means an elected state officeholder, a member of any state board or commission, or an unclassified employee serving in a policymaking capacity. "Administrative action", as defined in section 2(1) (MCL 4.412), includes only "nonministerial action." "Nonministerial action" in turn is defined in section 6(3) (MCL 4.416) as action taken "without the exercise of personal judgment regarding whether to take the action."

The Secretary of State and the Attorney General argued in their successful defense of the statute in Pletz v Secretary of State, 125 Mich App 335 (1983), that given the above definitions, the lobby act applies only to communications with policymakers which are intended to influence policy matters. Therefore, if the decision to purchase specific products or services requires the formation of policy or a judgment concerning the manner in which a particular policy should be applied, communications regarding these potential purchases are lobbying and subject to the Act. However, if no policy decision is required communications concerning a purchase are not lobbying and do not qualify a vendor as a lobbyist.

The State of Michigan has, through the years, developed a system of centralized purchasing for most supplies, equipment, and services. This system is provided for in various statutes. It is elaborated in a publication by the Department of Management and Budget known as the Administrative Manual. It is a comprehensive scheme which is designed to limit the discretion of those charged with purchasing for the State.

Selling to the State is usually a matter of fitting one's prices, products and services to the specifications, rather than an effort at persuading a public official to take an administrative action or make a policy decision. A vendor's communications with a public official under these circumstances would not constitute lobbying under the Act.

Consequently, whether lobbying is taking place during a vendor's communication with a public official concerning a sale, a discussion of a future contract

during the course of an existing contract or negotiations for specific terms, depends on whether the public official can, through the exercise of discretion, enter into an agreement with the vendor. If the communications are lobbying, then section 11(1) renders the payment of a commission unlawful because it is "compensation contingent . . . upon the outcome of an administrative or legislative action." Violation of this provision is punishable as a felony.

Enclosed is a letter to Julia D. Darlow issued August 27, 1984. This letter covers many of the issues you raise. In particular, it provides some guidance with respect to communications undertaken in the course of performing a contract.

This letter is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

Enc.

48-84-LI

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING

MICHIGAN 48918

November 2, 1984

Mr. Steve Jackson
Assistant Supervisor, Accounting
Delta Dental Plan of Michigan, Inc.
P.O. Box 30416
Lansing, Michigan 48909

Dear Mr. Jackson:

This is in response to your letter requesting an interpretation of the lobby act, 1978 PA 472 (the "Act").

The issue which concerns you is whether the Act is applicable to direct communications with public officials by persons attempting to sell services or supplies to state agencies. If the Act is applicable then some vendors or potential vendors will be required to register and report pursuant to the Act. In addition, section 11(1) of the Act (MCL 4.421) makes it a crime for a person to be compensated for lobbying when the compensation is contingent on the outcome of administrative or legislative action.

The Department is unable to provide a specific answer to your question without additional information. However, the following discussion is provided for your guidance.

Pursuant to section 5(2) of the Act (MCL 4.415), "lobbying" includes "communicating directly with an official in the executive branch of state government . . . for the purpose of influencing . . . administrative action." Thus, two matters must be considered to determine whether lobbying occurs: who is the object and what is the subject of the communication. Your question indicates the object of the vendor's communications concerning the sale of its product or services is an "official in the executive branch." Therefore, lobbying takes place only if the decision to purchase a specific product or service is an "administrative action."

According to section 5(9) of the Act, "official in the executive branch" means an elected state officeholder, a member of any state board or commission, or an unclassified employee serving in a policymaking capacity. "Administrative action", as defined in section 2(1) (MCL 4.412), includes only "nonministerial

action." "Nonministerial action" in turn is defined in section 6(3) (MCL 4.416) as action taken "without the exercise of personal judgment regarding whether to take the action."

The Secretary of State and the Attorney General argued in their successful defense of the statute in Pletz v Secretary of State, 125 Mich App 335 (1983), that given the above definitions, the lobby act applies only to communications with policymakers which are intended to influence policy matters. Therefore, if the decision to purchase specific products or services requires the formation of policy or a judgment concerning the manner in which a particular policy should be applied, communications regarding these potential purchases are lobbying and subject to the Act. However, if no policy decision is required, communications concerning purchase are not lobbying and do not qualify a vendor as a lobbyist.

The State of Michigan has, through the years, developed a system of centralized purchasing for most supplies, equipment, and services. This system is provided for in various statutes. It is elaborated in a publication by the Department of Management and Budget known as the Administrative Manual. It is a comprehensive scheme which is designed to limit the discretion of those charged with purchasing for the State.

Selling to the State is usually a matter of fitting one's prices, products and services to the specifications, rather than an effort at persuading a public official to take an administrative action or make a policy decision. A vendor's communications with a public official under these circumstances would not constitute lobbying under the Act.

In those cases where communications with a policymaker are aimed at influencing nonministeral action, section 11(1) makes the payment of a commission unlawful because it is "compensation contingent . . . upon the outcome of an administrative or legislative action." Violation of this provision is punishable as a felony.

This letter is an interpretative statement and not a declaratory ruling because no clear, concise statement of the facts surrounding the communication has been provided.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

11-84-LD

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING

MICHIGAN 48918

November 8, 1984

Ralph R. Safford
Meyer and Kirk
100 W. Long Lake Road, Suite 100
Bloomfield Hills, Michigan 48013

Dear Mr. Safford:

This is in response to your request for a declaratory ruling concerning the applicability of the lobby act (the Act), 1978 PA 472, to certain activities of your law firm.

You indicate that in 1977 your firm (Meyer and Kirk) was hired by The Southland Corporation (Southland) to actively participate "in public hearings on the adoption by the Liquor Control Commission of Licensing Qualification Rules, including Rules 29 and 35 (the so-called 'Gas Rules')." Following adoption of the rules, Southland, through Meyer and Kirk, filed suit against the Liquor Control Commission (the Commission) in June, 1978, to declare the rules invalid. The case is currently pending in circuit court.

After the effective date of the lobby act, the Commission scheduled a public hearing to consider proposed amendments to the same rules which are the subject of Southland's pending suit. You indicate that at that point:

> "Southland requested Meyer and Kirk to prepare an analysis of the amendments and a recommendation of what action, if any, to take. Meyer and Kirk did legal research, gathered statistical and other facts concerning current gasoline regulation in other states, analyzed the amendments and alternatives (as well as the current Gas Rules and exceptions) and recommended that Southland actively oppose the amendments.
>
> Southland then instructed Meyer and Kirk to oppose the amendments at the public hearing. Ralph Safford, a partner in Meyer and Kirk, attended and participated in the hearing on May 23. The hearing was conducted by the Commission itself, the members of which are 'public officials' under the Lobby Law."

Southland paid Meyer and Kirk approximately $1,650 for its research and analysis, and approximately $350 for "the actual 'lobbying' at the hearing."

You recognize that an attorney who communicates with members of a state commission for the purpose of influencing its action on proposed rules is "lobbying" as defined in section 5(2) of the Act (MCL 4.415). However, you ask whether Meyer and Kirk's participation at the May 23, 1984, public hearing falls within the narrow "practice of law" reporting exemption recognized by the Secretary of State and the Court of Appeals in Pletz v Secretary of State, 125 Mich App 335 (1983), and discussed at length in an interpretive statement issued to Senator John F. Kelly, dated April 25, 1984. A copy of the Kelly letter is attached for your convenience.

According to section 5(2), "lobbying" includes "communicating directly with an official in the executive branch of state government . . . for the purpose of influencing . . . administrative action." "Administrative action" is defined in section 2(1) of the Act (MCL 4.412) as follows:

> "Sec. 2. (1) 'Administrative action' means the proposal, drafting, development, consideration, amendment, enactment, or defeat of a nonministerial action or rule by an executive agency or an official in the executive branch of state government. Administrative action does not include a quasi-judicial determination as authorized by law."

In holding that the lobby act does not violate the title-body, one-object doctrine of the state constitution (Const 1963, art 4, §24), the Court of Appeals in Pletz, supra, stated:

> " . . . we do not find that the act attempts to regulate the practice of law. The act treats attorneys who lobby in an identical manner as non-lawyers, except the act, in §2(1), specifically does not govern attorneys' communications with officials in administrative agencies. Attorneys whose activities relate to the practice of law, for example involvement in a quasi-judicial determination (administrative law), do not fall under the ambit of the act." 125 Mich App 335, 348

During the proceedings which led to the issuance of the Court of Appeals decision, the Secretary of State was called upon to explain how he intended to interpret and enforce the Act. With regard to the practice of law question, an affidavit was submitted which indicated in relevant part:

> "I interpret the 1978 lobbying law as follows, and will administer, and enforce this law consistent with these interpretations:
>
> * * *
>
> "5, The 1978 Lobbying Law does not intrude into the 'practice of law' or to 'engage in the law business', for which a person must be regularly licensed and authorized to practice law in Michigan."

In the interpretive statement to Senator Kelly, the Department, in response to a series of hypotheticals, examined the extent to which persons engaged in the practice of law are excluded from the Act's registration and reporting requirements. While the response in Kelly does not specifically address the unique circumstances described in your letter, it does afford significant guidance.

Particularly noteworthy is the discussion found at pages 8 and 9 of the Kelly letter. While recognizing that the "practice of law" is an elusive concept, the Department found that a working definition of the phrase was obtainable for lobby act purposes. Relying upon those jurisdictions which had previously addressed "the matter of the inter-working of the lobby law and the practice of law," the Department noted:

> " . . . In the case of Baron v City of Los Angeles, 469 P2d 353 (1970), a California Court reasoned that while in a pragmatic sense the practice of law encompasses all of the activities performed by attorneys in a representative capacity (including legislative advocacy), for lobby law purposes the practice of law occurs only if difficult or doubtful legal questions are involved which, to safeguard the public, reasonably demand the application of a trained legal mind. The Court went on to hold that the lobbying ordinance under discussion did not apply to attorneys when:
>
> > ". . . 'acting on behalf of others in the performance of a duty or service, which duty or service lawfully can be performed for such other only by an attorney licensed to practice law in the State of California" 469 P2d at 358
>
> * * *
>
> The rule set out in the Baron case would seem appropriate for implementation in the context of Michigan's Lobby Act. That is to say, where an attorney is engaged in an activity which only an attorney licensed in Michigan can perform, then the Act will not require the attorney to register with regard to that activity." (emphasis added)

Before turning to the specific issue you raise, it should be noted that, prior to Meyer and Kirk's analysis of the proposed amendments, Southland had not made a decision to lobby at the public hearing. Under the Act and rule 1(1)(d)(iv), 1981 AACS R4.411, a person must account for "expenditures for lobbying", including any "expenditure for providing or using information, statistics, studies or analysis in communicating directly with an official that would not have been incurred but for the activity of communicating directly."

The Department has previously indicated that where a decision to lobby has not been made prior to requesting an analysis of an issue or proposed rule, the analysis is prepared for purposes other than lobbying and generally is not reportable under the Act. Consequently, resolution of the practice of law issue has

no effect upon Meyer and Kirk's activities before Southland decided to lobby the Commission, and the $1650 paid to the firm for its analysis is not subject to the Act's provisions.

However, it is clear that Meyer and Kirk's communication with the Commission regarding the proposed rule amendments was lobbying as defined in section 5(2). The question that remains is whether the lobbying activity was within the practice of law, and therefore outside the parameters of the Act, because the proposed amendments dealt with "[a]dministrative [r]ules which the attorney is also seeking to declare invalid in pending litigation on behalf of the same client."

As indicated in the letter to Senator Kelly, discussed above, for lobby act purposes the practice of law encompasses those activities "which only an attorney licensed in Michigan can perform." According to the facts you have provided, after conducting its analysis Meyer and Kirk recommended that Southland actively oppose the proposed rule amendments by communicating with the Liquor Control Commission at its May 23 hearing. At that point, Southland could have designated an officer or director of the company to present its views to the Commission, or it could have retained a professional lobbyist for that purpose. However, Southland chose to be represented at the hearing by Meyer and Kirk.

Given the options available to Southland, it must be concluded that communicating with the Liquor Control Commission for the purpose of influencing its action on proposed rule amendments was not an activity which could only be performed by an attorney licensed in Michigan. Thus, Meyer and Kirk's attendance and participation at the May 23 hearing was not within the practice of law for lobby act purposes. While Meyer and Kirk may have had an interest in the outcome of the rules hearing, an attorney from the firm could have attended as an observer to insure that Southland's interests in the pending lawsuit were not jeopardized in some manner. Any direct communication with the Commission, however, was subject to the Act's registration and reporting requirements.

As a consequence, Meyer and Kirk is required to register as a lobbyist agent because the $350 it received for participating at the hearing exceeds the $250 compensation or reimbursement threshold established in section 5(5) of the Act. In addition, Southland must register as a lobbyist if it surpassed the $1,000 expenditure threshold found in section 5(4) by paying Meyer and Kirk $350 for its lobbying effort.

This response is a declaratory ruling concerning the specific facts and question presented.

Very truly yours,

Richard H. Austin
Secretary of State

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

12-84-LD

November 8, 1984

Michael A. Quinn
Executive Director
Lansing Tri-County Employment
and Training Consortium
1850 W. Mt. Hope Avenue
Lansing, Michigan 48910

Dear Mr. Quinn:

This is in response to your request for a declaratory ruling concerning the applicability of the lobby act (the Act), 1978 PA 472, to the Executive Director of the Lansing Tri-County Employment and Training Consortium. Specifically, you ask whether the Director is an "elected or appointed public official" of local government who is exempt from the Act's registration and reporting requirements under section 5(7)(b) (MCL 4.415).

The Lansing Tri-County Employment and Training Consortium (the Consortium) exists under the authority of the Urban Cooperation Act, 1967 (Ex Sess) PA 7, as amended. The Consortium was established "by the mutual agreement of . . . the Cities of Lansing and East Lansing and the Counties of Ingham, Eaton and Clinton" to jointly carry out the provisions of certain job training and employment opportunity acts.

Pursuant to section 5 of its enabling statute (MCL 124.505), members of the Consortium entered into an "interlocal agreement." Under the agreement, the Consortium is governed by a twelve member Administrative Board (the Board). The Board, in turn, is authorized to hire a Director, who serves as "the executive and manager of the Administration." As stated previously, you ask whether the Director's lobbying activities are subject to the Act's provisions.

Persons who are excluded from the Act are identified in section 5(7), which states in relevant part:

> "Sec. 5. (7) Lobbyist or lobbyist agent does not include:
>
> (b) All elected or appointed public officials of state or local government who are acting in the course or scope of the office for no compensation, other than that provided by law for the office."

"Elected or appointed public officials of state or local government" is defined in rule 1(1)(c), 1981 AACS R4.411, to include officials who serve at the pleasure of their appointing authority. The Director of the Consortium, who serves at the pleasure of the Board, would at first appear to meet this definition. However, in an interpretive statement issued to Mr. Kenneth F. Light, dated January 24, 1984, the Department pointed out that rule 1(1)(c) cannot create a broader class of exempt officials than the legislature intended. Upon carefully examining the Act's provisions, the Department concluded that a person qualifies for the section 5(7)(b) exemption only if the person is an "elected or appointed public official" as defined in rule 1(1)(c) and the person serves in a policymaking capacity.

The answer to your question, then, depends upon whether the Director of the Consortium is a policymaker as contemplated by the Act. According to an interpretive statement addressed to Senator Ed Fredricks, dated December 7, 1983, a policymaker is a person whose duties are not clearly defined and include discretion or authority in matters involving the governmental agency. On the other hand, a person who operates at the direction or control of another or within specified boundaries does not serve in a policymaking capacity and is not a public official for purposes of the Act.

The duties and responsibilities of the Administration and its Director are set out in Chapter 9 of the Consortium's interlocal agreement. That chapter, in general, provides that the Director and Administration shall have duties and responsibilities "as may be required or directed by the Board." Chapter 9 further provides that the Director and Administration shall "prepare plans as directed by the Board," "develop a budget for submission to the Board," "develop and carry out a program to monitor and evaluate programs authorized by the Board," and finally, "operate all programs which are carried on under the direct authority of the Board." Consistent with these provisions, Chapter 5 of the agreement states that the Board's responsibilities shall include the "general supervision of [the] Director."

You assert that the duties and responsibilities described above place the Director in a position analogous to that of a county controller who, as indicated in a letter to Mr. James Stewart, dated June 22, 1984, is exempt from the Act's requirements. However, the office of county controller is created by statute and not by an agreement between political subdivisions. Moreover, statutory provisions relating to that office, and particularly section 13b of 1927 PA 257, as amended (MCL 46.13b), indicate that a county controller has a broad range of duties which include discretion or authority in matters involving the county.

The Director of the Consortium does not enjoy such autonomous statutory authority. On the contrary, the provisions of the interlocal agreement, which is the sole authority for the position, indicate the Director operates within boundaries specified by, and at the direction or control of, the Consortium's governing board. Thus, unlike a county controller the Director does not serve in a policymaking capacity and is not a public official for purposes of the Act.

In answer to your question, the Director of the Lansing Tri-County Employment and Training Consortium is not an elected or appointed public official of local government who is exempt from the Act under section 5(7)(b). The Director must therefore register as a lobbyist or lobbyist agent upon reaching the expenditure thresholds established in section 5(4) and 5(5) and file periodic disclosure reports as the Act requires.

This response is a declaratory ruling relating to the specific facts and question presented.

Very truly yours,

Richard H. Austin
Secretary of State

RHA/cw

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STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

November 21, 1984

Richard A. Groop, Captain
Commanding Officer, Executive Division
Department of State Police
714 S. Harrison Road
East Lansing, Michigan 48823

Dear Captain Groop:

This is in response to your letter of April 19, 1984, to Susan K. Clark, Supervisor, Campaign and Lobby Records Division, which answered her request for verification of public officials within the Department of State Police." I understand that in November, 1983, you originally submitted a list which included "executive secretaries and designated member's alternates or designees where applicable." In your review of the list included with Ms. Clark's letter of April 11, you noted executive secretaries were still included, and you wonder if they are in fact public officials. You also ask whether a person designated by a department director, who is a member of a body, to act in the latter's place on the board, council, or commission. becomes a public official for purposes of the lobby act (the "Act"), 1978 PA 472. The boards and commissions with which you are concerned are:

Michigan Emergency Preparedness Council
Michigan State Safety Commission
Law Enforcement Information Network Policy Council
Michigan Law Enforcement Officers Training Council
Fire Fighters Training Council
State Fire Safety Board
Municipal Fire Services Classification Board

In a letter to Mssrs. Conrad Mallett, Jr. and Brian P. Henry, dated April 6, 1984, it was pointed out that the test in determining whether or not a member of a commission is a public official for the purposes of the Act "is the non-policy making, non-administrative nature of the commission's activity." Another element in making this evaluation is whether or not the authority of the entity is advisory in nature. In a letter to Senator John M. Engler, dated March 1, 1984, it was pointed out that:

> "An entity with only advisory authority is 'nonpolicymaking, or nonadministrative' in nature. The function of such bodies is to advise a public official of proposals or proposed actions. Lobbying under the Act consists of direct communication with a public official for the purpose of influencing legislative or administrative action (MCL 4.415). Reading the Act to include communications with advisory groups would expand the Act to encompass indirect lobbying. Such a reading would broaden the Act beyond its parameters and might subject it to a challenge on constitutional grounds."

A review of the legislation creating the seven entities you enumerate indicates that only two appear to have been given purely advisory authority by the enabling legislation. The Michigan Safety Commission was created by 1941 PA 138, and is "composed of the following officials ex officio: . . . the commissioner of the state police" (MCL 256.561). The commission is empowered to hold monthly meetings and to:

> "consult and cooperate with all departments of state government in regard to traffic safety; to promote uniform effective programs of safety on streets and highways; to interchange information among the . . . departments of . . . state government for more effective safety conditions; to cooperate with . . . the United States government and with local governments in regulating highway traffic, and to encourage safety education in this state." MCL 256.562

The Emergency Preparedness Act (1976 PA 390) creates the Emergency Preparedness Council, which is to be appointed by and serve at the pleasure of the governor, and which is to "advise the governor and the director (of the department of State Police or his authorized representative) in the development of plans for the utilization of the resources and facilities of the state for the purposes set forth in this Act" MCL 30.415(1)

The other five entities all have policymaking functions and are therefore more than purely advisory groups. For example, the Michigan Law Enforcement Officers Training Council Act of 1965 (1965 PA 203, as amended) creates an eleven member council with the authority to do such things as "visit and inspect" police training schools, "issue certificates to police training schools qualifying under the rules of the council" (and thus the authority to promulgate such rules), and require a state examination for police officers. MCL 28.611 This act, mirrored in large measure in the Firefighters Training Council Act of 1966 (1966 PA 291) involves the council in deciding issues of policy, both for the council and ultimately for the state. Similar duties may be found concerning the State Fire Safety Board (which is to promulgate rules pertaining to fire safety requirements in schools and dormatories, and to the handling of hazardous materials, among other things, and which may also "act as a hearing body" to rule on various issues - MCL 24.3c), the Municipal Fire Service Classification Board (which is to "submit rules for public hearing . . . which set forth a method of evaluating fire service delivery systems," review each municipality's

fire safety delivery system" and grade it - MCL 28.656) and the Law Enforcement Information Network Policy Council (which is to "establish policy and promulgate rules regarding the operational procedures to be followed by agencies using the . . . system," - MCL 28.214).

Groups which do not make policy need not appear in such a list as you have provided. However, it would appear that each individual entity must be reviewed to resolve the first issue. As a general matter, however, if the activities of the entity may be described as "nonpolicymaking, or nonadministrative," or the entity has only advisory authority, members of that council; commission or board would not be considered public officials simply because of service on the particular council, commission or board. In addition, even though a board may have policymaking authority, a person whose relationship to the board is clerical or nonpolicymaking would not be a public official. A closer examination of the duties and powers of the executive secretaries is necessary to determine their status under the Act. Conversely, a member of a particular council, board or committee becomes a "public official" for purposes of the Act if the activities include establishing or defining policies of an entity which has more than advisory authority.

The other issue you raise, which concerns surrogates or substitutes who are designated to act in the place of the member, is more problematic than it would appear. A number of considerations must be analyzed to resolve this issue. For example, does the legislation which creates the entity provide that a specific person shall serve in that entity (i.e., "the director . . . shall serve on the . . . commission")? Does it provide that "a representative of the department . . . shall serve . . . . "? Or, does it state that "a person appointed by . . . shall serve . . . ."? In actual practice, is a specific person designated to attend all meetings or is the task rotated through an office in no particular order? Is the discretion of the surrogate unfettered or does the substitute do only what he or she is asked to do by the actual member? Does the substitute express his or her own positions or reflect positions held by the member?

In discussing this issue it should be first noted that, as a general proposition, membership in a particular entity is personal to the individual named in the enabling legislation. This is similar to the public official exemption from the inclusion as a lobbyist/lobbyist agent created by section 5(7)(b) of the Act (MCL 4.415) which was discussed in a letter to Mr. Ted Vliek dated June 11, 1984. That letter was from an administrative assistant to a school superintendent who assumes the duties of the superintendent in his absence and who inquired if, in assuming those duties, he also assumed the 5(7)(b) exemption. In response it was pointed out that the superintendent is the only appointed school administrator qualifying for the exemption because "The exemption for public officials is personal to the individual occupying the office and does not extend to other individuals."

With respect to the entities you mention, membership in some is limited to the "commissioner (or director) of state police or his (or her) designated represen-

tative" - MCL 28.603, MCL 29.366, MCL 28.651. In the case of the L.E.I.N. Policy Council, while the Attorney General "or his designated representative" is a member, the statute also provides for "three representatives of the department of State Police, to be appointed by the director of the department . . . " (MCL 28.212). Members of the Emergency Preparedness Council are appointed by and serve at the pleasure of the governor (MCL 30.415(2)) while membership on the State Safety Commission includes the "following officials ex officio: . . . the commissioner of the state police (MCL 256.561). The 16 members of the Fire Safety Board are determined by statute to include 3 representatives of organized fire departments in the lower peninsula, 1 from an organized fire department in the upper peninsula, a representative of hospital administration, a registered professional engineer, a registered architect, a representative of the nursing home industry and others specified by MCL 29.3b.

A person who is appointed to be a member of a state board or commission is clearly a public official. Similarly, when the enabling statute provides for a "designated representative," or an "alternate" these individuals also become public officials. Lobbyists or lobbyist agents communicating with such individuals in an effort to influence their votes on the board or commission must report expenditures made for such communications.

On the other hand, a person who occasionally participates on a board or commission as a substitute for the actual member does not become a public official by virtue of such activity. In such situations the public official retains the policymaking authority inherent in the public office. Each case would depend on the specific facts.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

Enc